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FEDERAL COURT REJECTS BID TO SILENCE CORPORATE SPEAKER

by
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Businesses sat up and took notice several years ago when Nike, Inc. was silenced by activists critical of its overseas labor practices. Nike responded by writing letters defending its practices; but that only led to activist suits under California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.* When the California Supreme Court ruled that Nike was not entitled to full First Amendment protection for its letters and the U.S. Supreme Court dismissed an appeal, Nike threw in the towel and paid to settle the suit. The whole episode left executives wondering whether it was ever worth their while to speak up on issues of public importance.

A decision this spring from a federal district court in Los Angeles suggests that it may no longer be open season on corporate speakers. The court dismissed a suit against Wal-Mart in which activists raised claims that mimicked those previously filed against Nike. *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 (C.D. Cal. Apr. 2, 2007). Wal-Mart was accused of entering into supply contracts with overseas factories that employed "sweat shop" working conditions, and then lying to the American public about its practices. The court dismissed the plaintiffs' § 17200 claim, as well as a variety of other state and federal claims, for failure to state a cause of action. The dismissal is now on appeal to the U.S. Court of Appeals for the Ninth Circuit.

California law has changed in one significant respect since the Nike case was litigated. In 2004, California voters adopted Proposition 64, which amended § 17200 to eliminate its "private attorney general" feature. While previously, any private citizen was entitled to file suit under § 17200 to challenge allegedly false speech by a business entity, Prop 64 changed the law so that now the plaintiff must be someone who has "suffered injury" and has "lost money or property" as a result of the allegedly unfair business practice. The plaintiffs in *Doe* alleged that their injury arose because they worked for Wal-Mart competitors who paid lower salaries because Wal-Mart's unfair labor practices allowed it to undercut the competition. They alleged that if Wal-Mart stopped lying about its practices, consumers would stop patronizing Wal-Mart and their salaries would increase.

The district court found that injury claim too far-fetched and dismissed the § 17200 claim. It held that only consumers can demonstrate the requisite injury under this consumer protection law. In addition to dismissing a variety of other state-law causes of action, the district court also dismissed the plaintiffs' claims under the Alien Tort Statute (ATS), which allows foreigners to sue in U.S.

courts for certain violations of international law. The plaintiffs (who included some anonymous foreign factory workers) claimed that by tolerating sweat-shop conditions in its suppliers' factories, Wal-Mart was aiding and abetting slave labor. The district court ruled that regardless of the actual working conditions in those factories (and Wal-Mart insists that it polices conditions carefully), the conditions could not be equated with slavery and thus were not actionable under the ATS.

Richard A. Samp is Chief Counsel of the Washington Legal Foundation (WLF). He authored WLF's *amicus curiae* brief in support of Wal-Mart in the district court.

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